In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1409

MELIAH BELL, PETITIONER

v.

GOVERNMENT OF THE VIRGIN ISLANDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1970. The petition for a writ of certiorari was filed on April 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Congressional provision allowing criminal proceedings in the Virgin Islands to be instituted by information rather than on an indictment of a grand jury is constitutionally permissible.

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2. Whether the sentencing procedure adopted by the trial court was violative of this Court's ruling in *North Carolina* v. *Pearce,* 395 U.S. 711.

3. Whether petitioner was given a fair trial.

STATEMENT

On March 24, 1966, an eight count information was filed in the United States District Court for the Virgin Islands, charging petitioner with violating 14 V.I.C. § 834(2) by knowingly defrauding various business establishments, or the American Express Company, in presenting to these establishments an American Express Company credit card issued in the name of one Meyer Odence and thereby obtaining valuable property or money. The offenses were alleged to have occurred within the two-day period of March 10–11, 1965.

At the first trial, count V of that information was dismissed. The jury found appellant guilty on all seven remaining counts. An appeal followed and the court of appeals reversed for reasons not relevant here (392 F. 2d 207). On May 2, 1969, an amended information was filed charging appellant with violations of 14 V.I.C. § 834(2) on seven counts.[1] Upon retrial, which began on May 6, 1969, the jury returned a verdict of guilty on all counts.

[1] The original information in counts IV and V charged petitioner with two separate purchases of $430, each occuring on different days. It appeared, however, that in this regard only one $860 purchase had been made, rather than two smaller ones, and the storekeepers had filled out two cards with separate dates in order to circumvent an American Express policy of honoring a maximum daily single charge of $500 without company approval (Tr. 41–42). The discovery of this event led

At the trial, the widow of Meyer Odence testified that on March 10 and 11, 1965, while she and her husband were in Hawaii, her husband noticed his American Express credit card was missing (Tr. 119–120). She also testified she had been married to Mr. Odence for 37 years and was able to recognize his handwriting (Tr. 120). A cancelled check bearing Mr. Odence's signature was then admitted into evidence (Tr. 121, 124). When shown forms evidencing the various sales which had been signed "M. Odence," Mrs. Odence stated the signature thereon was not her husband's (Tr. 122).

With respect to count I, the saleslady involved in the transaction identified the petitioner as the one who made a purchase of a $558 watch (Tr. 83–84). She remembered him because he was not grouchy, "was sort of a flirt," and had made a statement that he didn't need a receipt because he was going to smuggle the watch into Puerto Rico (Tr. 84).[2]

Petitioner was also identified as the person who signed American Express forms as "M. Odence" with respect to two other sales contained in counts IV

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to the dismissal of count V at the first trial, since count IV charged the same offense. Prior to the trial involved here, an amended information was filed. The only difference between the two informations was that the $430 amount originally included in count V was added to count IV of the new information and all remaining counts were renumbered accordingly. Although petitioner was never technically arraigned on the amended information, the record reveals that it was read to him (Tr. 2) and that he proceeded to trial on it.

[2] On cross-examination, she testified she thought he was joking when he made this statement (Tr. 87). The govern-

and V of the amended information (Tr. 41–44, 64–66; Tr. 95, 97).

The government proved the remaining counts without personal identification. There were introduced the American Express forms evidencing the sales, and testimony that the store's records on the tenth and eleventh of March, 1965 revealed sales-charges made on an American Express card signed by an "M. Odence" in the amounts alleged in the amended information (Tr. 105–107).[3]

ARGUMENT

1. The statutory provision for prosecuting offenses in the Virgin Islands by information rather than upon indictment (48 U.S.C. (Supp. IV) 1561) is constitutional. Many years ago, in the "Insular Cases" (*Downes* v. *Bidwell,* 182 U.S. 244; *Dorr* v. *United States,* 195 U.S. 138), and in *Balzac* v. *Porto Rico,* 258 U.S. 298, this Court recognized that the provisions of the Bill of Rights are not automatically applicable to the territories for which, under Article 4, Section 3

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ment never contended he was serious, but rather, maintained that the fact the witness remembered the statement was important (Tr. 135).

[3] The person having custody of these store records relating to three of the remaining counts testified the records did not reveal which salesman sold the item involved in count VII and the records on counts III and VI contained initials representing a salesman who was deceased at the time of trial (Tr. 115–116). The jury took with them *all* eight forms upon which petitioner allegedly had signed the name "Meyer Odence." The jury was specifically advised by government counsel to compare the signatures on the forms attributed by eye witnesses to have been signed by the petitioner in their presence with each

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of the Constitution, Congress is authorized to make rules and regulations.[4] This broad constitutional authority to govern the territories gives Congress considerable latitude to adopt criminal procedures there that take account of the prior experience of those areas that is different from that in the United States. The statutory provision governing the prosecution of crimes in the Virgin Islands, which provides that "all offenses shall continue to be prosecuted in the district court by information as heretofore, except such as may be required by local law to be prosecuted by indictment by grand jury," is an appropriate exercise of that authority.

Indeed, this Court noted in *Balzac, supra,* at p. 313, that simply by citing the "Insular Cases" in a per curiam order, it had previously specifically rejected the argument that indictment by a grand jury in felony cases was constitutionally required in the territories. See *Porto Rico* v. *Tapia* and *Porto Rico* v. *Muratti,* 245 U.S. 639.

The rationale of these cases was not affected by the rulings in *Reid* v. *Covert,* 354 U.S. 1, *Kinsella* v. *Singleton,* 361 U.S. 234, and *McElroy* v. *Guagliardo,* 361 U.S. 281. Those decisions dealt with the Congressional power to regulate the land and naval forces, not with

signature on the other forms. The jury was also advised to compare all these signatures with the signature on the cancelled check of the late Meyer Odence (Tr. 131).

[4] Article 4, Section 3 of the United States Constitution provides in relevant part: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

the power to regulate territories. In this connection, it was determined the term "land and naval forces" was not intended to encompass civilian dependents of servicemen, and the "Insular Cases" were distinguished on the ground that, since "[n]one of these cases had anything to do with military trials" (*Covert, supra,* at 14), they could not "properly be used as vehicles to support an extension of military jurisdiction to civilians" (*ibid.*). Petitioners' attempt to have the *Covert* and *Singleton* decisions interpreted as overruling the concept of territorial courts (in the context of an attack on the lack of life-time tenure for judges) has been rejected. *Abreu* v. *United States,* 308 F. 2d 248 (C.A. 1), certiorari denied, 372 U.S. 918; *United States* v. *Montanez,* 371 F. 2d 79 (C.A. 2), certiorari denied, 389 U.S. 884.

2. The sentencing procedure followed by the trial court did not prejudice any rights of appellant. At the first trial, appellant received five-year sentences on counts I and II, these sentences to run consecutively with each other and concurrently with the five-year sentences imposed on the remaining five counts. After conviction on retrial, the court sentenced appellant to nine years' imprisonment on each count, these sentences to run concurrently. In addition, he was allowed credit for time served (Tr. 183).

We find nothing in *North Carolina* v. *Pearce,* 395 U.S. 711, to indicate that, in considering whether a more severe sentence has been imposed on retrial, each count must, as petitioner argues, "stand alone" (Pet. 13). Rather, the rationale underlying *Pearce* is that the imposition of a longer term of punishment after

retrial, would have the effect of "penalizing those who choose to exercise constitutional rights", and would thus have a "chilling effect." That rationale is inapplicable here.

Had petitioner not been successful in attacking his first conviction, his prison term would have been ten years. Upon retrial, he was sentenced to imprisonment for a total of nine years less credit for time served. Accordingly, his second sentence was less severe than the first. Under the circumstances, there is no violation of the *Pearce* rule.

3. The petitioner was afforded a fair trial.

a. In the course of instructing the jury the trial judge commented (Tr. 167):

> I think we can assume *or at least I believe but my belief isn't binding on you,* that somebody—I think the evidence is overwhelming—that somebody came into St. Thomas on March 10th and 11th of 1965 and took a lot of valuable merchandise out by the misuse of a credit card. Now, members of the jury, if that man was Meliah Bell and you are convinced of that beyond a reasonable doubt, I think you have a duty to convict him. If you are not satisfied beyond a reasonable doubt, you have a duty to acquit him. [Emphasis added.]

Although no objection was made at that time, petitioner now argues this instruction "withdrew key and crucial fact issues in this case from the jury's consideration" (Pet. 13). The trial judge's characterization of the posture of the evidence was, however, eminently correct. Moreover the judge made clear to

the jury they were to be the final judge of the facts. His remarks thus fell well within the province of the judge to comment on the evidence and clarify issues for the jury. *Jones* v. *United States,* 361 F. 2d 537, 540 (C.A.D.C.); *Kyle* v. *United States,* 402 F. 2d 443 (C.A. 5); *United States* v. *Tomlin,* 380 F. 2d 373 (C.A. 3).

b. Petitioner asserts error in the refusal of the trial judge to give a proffered instruction on identification which the judge found to be argumentative (Tr. 127). This ruling was well within the discretion of the court. *United States* v. *Moss,* 410 F. 2d 386 (C.A. 3); see *United States* v. *O'Brien,* 255 F. Supp. 755, 770 (E.D. Mich.). The court adequately protected petitioner's rights by instructing the jury the issue was whether or not the appellant was the person who misused the credit card and by including proper instructions on reasonable doubt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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